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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	
)	2:15-CR-6049-EFS
Plaintiff,)	
)	UNITED STATES'
vs.)	CONSOLIDATED RESPONSE TO
)	DEFENDANTS' MOTIONS IN
EDGAR OMAR HERRERA FARIAS,)	LIMINE (ECF Nos. 617, 619, 620,
MIGUEL REYES GARCIA,)	623)
JUAN BRAVO ZAMBRANO)	
)	
Defendants.)	

Plaintiff, United States of America, by and through, Joseph H. Harrington,
United States Attorney for the Eastern District of Washington, and Stephanie Van
Marter and Caitlin Baunsgard, Assistant United States Attorneys for the Eastern
District of Washington, submits the following consolidated response to the
Defendants' Motions in *Limine* (ECF. 617, 618, 623) and Motion for Bill of
Particulars (ECF. 620).

UNITED STATES' CONSOLIDATED RESPONSE TO DEFENDANTS'
MOTIONS IN LIMINE - 1

1 The Defendants have filed several different motions in *limine*, which other
2 Defendants have joined. The United States is filing this consolidated response in an
3 effort to address all the Defendants assertions in the most efficient manner.

4
5 **A. ADMISSIBILITY OF EXPERT TESTIMONY (ECF. 617)**

6 Defendant HERRERA-FARIAS¹ has submitted a Motion in *Limine* concerning
7 the United States' Notice of Experts. ECF. 617. The United States has already
8 responded to a similar objection as raised by Defendant Casillas. *See*, ECF 596.

9 Defendant Farias argues that all such testimony should be excluded because it is both
10 improper expert and lay witness testimony. To the contrary, the testimony sought to
11 be admitted by the United States, depending on the witness, can be admitted as both
12 lay witness and expert testimony.

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14 As the United States indicated in its previous response, often times the
15 testimony of those who are former members of this Drug Trafficking Organization
16 and therefore, have first-hand knowledge as to the methodologies utilized by the
17 organization, can alleviate the need to present further expert testimony on the issue.
18 The United States anticipates that there will be multiple cooperating defendants who
19 will testify as to their role in this organization, the roles they knew other co-
20 conspirators played and the general functions of the drug trafficking organization.
21 Such testimony, contrary to Defendant's assertions, is not making a lay witness serve
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28 ¹ Other Defendants have joined in this motion.

1 as an expert. Rather, it is proper lay witness testimony based upon their personal
2 involvement; they are not drawing expert opinions but rather restating the facts based
3 upon their personal observations and involvement.

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5 The United States also anticipates calling multiple law enforcement officers
6 who participated in some aspect of this investigation. They too can properly present
7 lay witness testimony as to the things they observed. They are also permitted to draw
8 certain conclusions based upon their training and experience that does not rise to the
9 level of expert testimony.
10

11 Under Federal Rule of Evidence 701, a lay witness may testify “in the form of
12 an opinion” if it is “(a) rationally based on the perception of the witness; (b) helpful to
13 a clear understanding of the witness' testimony or the determination of a fact in issue;
14 and (c) not based on scientific, technical, or other specialized knowledge.”
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16 Fed.R.Evid. 701. “Rule 701(a) contains a personal knowledge requirement.” *United*
17 *States v. Lopez*, 762 F.3d 852, 864 (9th Cir.2014). “In presenting lay opinions, the
18 personal knowledge requirement may be met if the witness can demonstrate firsthand
19 knowledge or observation.” *Id.* “A lay witness's opinion testimony necessarily draws
20 on the witness's own understanding, including a wealth of personal information,
21 experience, and education, that cannot be placed before the jury.” *United States v.*
22 *Gadson*, 763 F.3d 1189, 1208 (9th Cir. 2014). But a lay opinion witness “may not
23 testify based on speculation, rely on hearsay or interpret unambiguous, clear
24 statements.” *United States v. Vera*, 770 F.3d 1232, 1242 (9th Cir.2014).
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1 See also, *United States v. Lloyd*, 807 F.3d 1128, 1154 (C.A.9 (Cal.),2015); *United*
2 *States v. Freeman*, 498 F.3d 893, 904 (9th Cir.2007)(A law enforcement officer
3 testifying as an expert in drug jargon may also testify as a lay witness if he was
4 involved in the investigation); *United States v. El-Mezain*, 664 F.3d 467, 513–14 (5th
5 Cir.2011) (allowing lay opinion testimony interpreting telephone calls when “the
6 agents' opinions were limited to their personal perceptions from their investigation of
7 this case”); *United States v. Rollins*, 544 F.3d 820, 830–33 (7th Cir.2008) (finding no
8 error in the district court's decision to allow the agent's testimony regarding his
9 “impressions” of recorded conversations when the testimony was “based on the
10 agent's perceptions derived from the investigation of this particular conspiracy”).
11 *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir.2011) (holding that a lay
12 witness's testimony was admissible even though “he did not personally observe or
13 participate in the defendants' conversations”); *United States v. Garcia*, 994 F.2d 1499,
14 1507 (10th Cir.1993) (admitting an officer's opinion based only “on listening to the
15 conversations between coconspirators”).

16 Thus, proper law witness testimony derived from their own observations and
17 involvement is appropriate so long as the Court is satisfied as to its relevance and
18 foundation. The next layer of testimony, the proposed expert *modus operandi*
19 testimony, is based upon the generalities of drug trafficking organizations rather than
20 on anything specific as to this organization as a lay witness would testify. The United
21 States is therefore mindful of any issues where a witness would offer fact testimony
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1 and then propose modus operandi testimony. That is predominantly the reasoning why
2 the United States may elect to not seek expert testimony from all of the witnesses in
3 its notice. However, whereas here proper notice has been filed, the United States may
4 present such modus operandi testimony to assist the jury in understanding the
5 complexity of international drug trafficking organizations such as this. The United
6 States would not seek to present testimony as to an ultimate conclusion or fact in this
7 testimony.
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10 Moreover, just because evidence or testimony is damaging to the defendant's
11 case does not make it unduly prejudicial. Expert testimony may only become unduly
12 prejudicial if the information to which the expert testifies is outside the scope to which
13 the defendant is charged, see *United States v. Vallejo*, 237 F.3d 1008 (2001), but the
14 probative value of the testimony must be considered on a case by case basis as
15 required by Fed. R. Evid. 403. *United States v. Sepulveda-Barraza*, 645 F.3d 1066,
16 1070-1071 (2011) (where the particular finding in *Vallejo* did not create a per se rule).
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19 The United States understands this will further be weighed during trial but
20 respectfully submits the law allows such testimony as long as the Court is satisfied the
21 underlying bases have been met and the sum and substance remains more probative
22 than prejudicial.
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2 **B. TESTIMONY SOUGHT TO BE EXCLUDED (ECF. 618 & ECF. 623)**

3 Defendant VASQUEZ-MENDOZA² submits the United States should be
4 excluded from presenting various forms of testimony. ECF. 618. Defendant BRAVO
5 ZAMBRANO filed a similar request in terms of seeking, in essence, to prohibit the
6 United States from not complying with the Federal Rules of Evidence or the Federal
7 Rules of Criminal Procedure. ECF. 623. While the authority the Defendant relies on
8 appears to be mixed federal and state, the United States has no intention of
9 introducing or soliciting the types of testimony referenced in this motion. The United
10 States is familiar with the Federal Rules of Evidence, and intends to follow them. The
11 United States respectfully submits a Court Order memorializing such is not necessary.

12
13 Paragraph 9 seeks to prevent the United States from “eliciting any testimony
14 concerning criminal profiles of narcotics traffickers.” ECF. 618 at p. 4. The
15 paragraph appears to detail testimony based on racial or ethnic characteristics. The
16 United States does not intend to base any testimony on characterizations about anyone
17 based on their race or ethnicity. The United States *does* however, intend to illicit
18 testimony about the general organization structure of drug trafficking organizations
19 and the various roles its participants play in such organization, as noted in the United
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27 ² Other Defendants have joined in this motion.

1 States' Notices of Expert. The United States will also seek to solicit testimony (in a
2 non-cumulative fashion) from cooperating defendants who will be testifying at trial.

3 Defendant also seeks to exclude any and all booking photographs. The United
4 States intends on utilizing photographs in presenting an outline to the jury in its
5 opening and closing statements as well through witness testimony. It would be the
6 same photographs utilized in its summary PowerPoint which are not booking
7 photographs.
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10 In a case such as this where there will be testimony as to a number of different
11 coconspirators and evidence that spans a large time period, the use of photographs to
12 aid the jury and witnesses is important. These photographs are not objectionable.
13

14 As previously addressed before the Court, the United States is not aware of any
15 Bruton issues.
16

17 **C. MOTION TO EXCLUDE CO-CONSPIRATOR STATEMENTS.**

18 Defendant REYES-GARCIA and BRAVO ZAMBRANO have moved to
19 exclude all "alleged co-conspirator statements." ECF, 619, 623. Without addressing
20 any proposed statement with specificity, Defendants have further argued the United
21 States has failed to establish their client's connection to the Conspiracy and must be
22 required to review all proposed testimony at the pre-trial conference in order to
23 determine its admissibility.
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26 First, it is difficult to respond to such an overly broad motion. The United States
27 has provided to counsel in discovery copies of all the reports to include redacted free
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1 talk reports. *See*, Attachment A. Although the identity of the persons in the free talk
2 is redacted at this time, the substance of their proposed testimony as to each
3 Defendant is clear. Each Cooperating Defendant is also given a number, i.e. CD4 for
4 ease of counsel to review the potential testimony. Counsel has also been provided the
5 summary PowerPoint utilized for grand jury and an invitation to review the potential
6 evidence against each defendant with assigned counsel. Yet, counsel has filed this
7 motion without any specificity in order to address which co-conspirator statements are
8 somehow violative of the Rules of Evidence other than to broadly argue all should be
9 excluded. The United States responds as follows.

12
13 1. Factual Background as to Zambrano and Reyes:

14 ZAMBRANO and REYES, first challenge their connection to the conspiracy.
15 As is outlined in multiple affidavits, summaries and reports, members of the FBI
16 Eastern Washington Safe Streets Violent Gang Task Force- Tri-Cities (EWVGSSTF)
17 have been investigating a transnational drug trafficking organization operating herein
18 the Eastern District of Washington and elsewhere since approximately 2011 identified
19 as the Ivan Hernandez Calvillo Drug Trafficking Organization (DTO). During that
20 investigation, Ivan Hernandez Calvillo (hereinafter Calvillo) and later, Co-Defendant
21 Casillas, were identified as a high-ranking members of the DTO. Members of the
22 Task Force, through the interviews of multiple cooperating Defendants and drug
23 seizures, learned the DTO was utilizing various methods of distribution to include the
24 use of backpackers to physically carry quantities of cocaine, methamphetamine and
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1 heroin from the Eastern District of Washington through a trail system into Canada.

2 The United States anticipates testimony at trial from various cooperating defendants,
3 noted in the free talk reports already disclosed, about how this trail system worked.
4

5 Defendant Reyes Garcia was first identified as working with this DTO in
6 approximately 2011. Several cooperating Defendants and informants have positively
7 identified the Defendant and his brother, Baltazar Reyes Garcia (not indicted here) as
8 trafficking in large quantities of cocaine and that they worked with the Calvillo DTO.
9

10 For instance, as noted on Discovery Page CD4_30, one cooperating defendant
11 provided information that Ivan Calvillo, during the time of the conspiracy, told CD4
12 that the Defendant Reyes and his brother Baltazar owed Ivan \$70-80,000. As a result,
13 when CD4 was in charge of operations for Ivan (2012 into 2013) CD4 stated that
14 Defendant Reyes provided CD4 with 20 pounds of methamphetamine in payment for
15 that debt.
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18 Defendant Reyes, like Defendant Zambrano was also identified as
19 backpacking quantities of narcotics from the EDWA into Canada for this organization.
20

21 The United States anticipates that there will be source testimony that Defendant
22 Zambrano along with his brother, predominantly were utilized to backpack quantities
23 of narcotics across the border for this organization while Defendant Reyes Garcia as
24 noted above, had been involved more extensively over the years until his arrest noted
25 below. See, Discovery Pages (to include but not limited to), 10001509, 1000159-
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1 1520, 10002110-2111, 10001035, 10001594, 10001847-1848, 400000011, 37, 670,
2 717, 722, 741.

3 During this same time-frame, members of the Boston DEA were conducting
4 a parallel investigation into the money laundering activities of the Calvillo DTO. The
5 DTO was moving bulk cash out of Canada that it had gained through the sale of
6 cocaine, heroin, and methamphetamine. The DEA successfully placed an undercover
7 operator (DEA UC) into the money-laundering network. The basic need the DEA UC
8 filled for the organization was his ability to accept Canadian cash, deposit it, wash it
9 electronically through his business, and then wire US currency out in smaller deposits
10 to Mexico and the United States. The DEA UC would charge a commission or
11 percentage for the washed cash, keep that percentage and report to Calvillo, and later
12 the Defendant, as to the remaining amount available for wire transfer. This
13 relationship ultimately cultivated into Calvillo and the organization seeking the DEA
14 UC's assistance in developing a new drug distribution group in Vancouver BC with
15 ties to China.

16 In October 2014, an undercover money laundering operation was formally
17 initiated by Royal Canadian Mounted Police Federal Serious Organized Crime Unit
18 (RCMP FSOC) members to collect bulk money in the area of Vancouver, British
19 Columbia from the DTO and to deliver it to DEA investigators. RCMP utilized
20 several undercover agents to play the role of the business associates in Vancouver,
21 hereafter referred to as RCMP UC1, 2 and 3. Between October 2014 and July 2016,
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1 Calvillo, and later the Defendant, were in direct communication with the DEA UC via
2 recorded What's App messenger and arranged for approximately 15 cash money drops
3 to be laundered by the DEA UC. A code was utilized between the CEA UC, Calvillo
4 and later the Defendant wherein Calvillo or the Defendant provided the DEA UC a
5 serial number of a piece of currency. The DEA UC would communicate that serial
6 number so that when the two associates would meet, they would compare serial
7 numbers. Once that was confirmed, the money was handed off. The amount
8
9 laundered during these money drops totaled over \$1.6 million Canadian Dollars.

11 In approximately August 2015, Co-Defendant Casillas was introduced to the
12 DEA UC as a partner of Calvillo's. Several face-to-face meetings, as well as What's
13 App communications, began to occur between the DEA UC and the Defendant.

15 On August 23, 2015, Calvillo arranged for a cash drop in Vancouver BC as
16 well as the delivery of one kilogram of heroin. This time Javier Camillo Gomez
17 Calvillo, a.k.a. Angel was sent to make the money drop. The meet was audio/video
18 recorded. Angel was driving a blue Mercedes registered to a residence associated
19 with Sobieda Reynosa (previously identified by the RCMP as a girlfriend/associate of
20 an identified leader/organizer in the Vancouver area). Angel delivered \$74,029 in
21 Canadian currency to the Canadian Under Cover (CUC) and a kilogram of heroin to
22 the CUC. After the DEA UC withdrew the percentage charged for laundering the
23 money, Calvillo directed the DEA UC to wire the remaining funds to accounts in
24 Mexico.

1 Based upon the identification of the blue Mercedes and Gomez Calvillo, the
2 RCMP followed the activities of Gomez Calvillo. This surveillance led them to the
3 Grand Forks area, an identified location associated with this organization and
4
5 backpacking narcotics across the border. The RCMP followed the Mercedes to the
6 Ramada Inn and identified that Reynosa registered for a room at the hotel. On August
7 26, 2015, the RCMP was conducting surveillance at the hotel and observed the
8
9 aforementioned Mercedes leave the hotel at approximately 5:00am occupied by
10 Reynosa and Gomez Calvillo. Surveillance confirmed its travel toward the border but
11 then lost sight of the vehicle for approximately 15-20 minutes. When the vehicle was
12
13 located again, it was coming back toward the hotel, this time with 5 occupants. The
14 Mercedes returned to the hotel where the five occupants were seen entering into room
15 203. A short time later, the vehicle departed the hotel again, this time with four
16
17 occupants. A traffic stop was initiated and all occupants were arrested. The driver
18 was identified as Sobieda Reynosa the passengers were identified Defendants Juan
19 Bravo Zambrano, Marciel Zambrano and fugitive Javier Camilo Gomez Calvillo.
20

21 A search warrant was obtained and on August 27, 2015, the search warrant
22 was executed on the vehicle. Inside a secret compartment in the vehicle, RCMP
23 located approximately 18 kilograms of methamphetamine, 4 kilograms of cocaine,
24
25 171 grams of heroin, \$50,000 in UC currency, two loaded firearms, ammunition,
26 several backpacks, walkie talkies, jackets and one cellular phone. A search warrant
27 was also obtained for two rooms identified as utilized by these individuals at the
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1 Ramada Inn. Located inside the room was the Defendant, Miguel Reyes Garcia
2 confirmed to be the fifth person seen earlier in the car. It was further confirmed that
3 the general location where the Mercedes traveled to at 5:00 a.m., returning with three
4 additional passengers, correlates directly with a trail head location utilized by the
5 Calvillo DTO. Inside the motel room agents seized the Defendant's wallet, a receipt
6 and multiple cellular telephones.
7

8
9 The controlled substances were tested in Canada as well as by the DEA
10 laboratory and returned with the following results: (1) 16,606 grams of actual
11 methamphetamine; (2) 2005 kilograms of cocaine and (3) 99.3 grams of heroin.
12

13 Subsequent fingerprint testing of the packages of controlled substances
14 revealed a number of fingerprints to include several belonging to the Defendant.
15

16 After his arrest, Defendant Reyes Garcia was deported back to Mexico from
17 Canada and was identified as unlawfully returning to the EDWA in 2016 and again
18 working for the DTO as well as his brother, Baltazar Reyes Garcia. Defendant
19 Zambrano was deported back to the United States where he was not seen in the area
20 again until just prior to his arrest in 2016.
21

22 2. Conspiracy Law

23 The United States and the Defendants agree that in order to convict the
24 Defendant of Conspiracy to Distribute 500 Grams or More of a Mixture or Substance
25 Containing a Detectable Amount of Methamphetamine, 5 Kilograms or More of
26 Cocaine, 1 Kilogram or More of Heroin and 400 grams or More of Fentanyl, in
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1 violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(i), (ii)(I), (vi), and (viii); all in violation
2 of 21 U.S.C. § 846, the United States would have to prove beyond a reasonable doubt
3 the following elements:

4
5 First, beginning on a date unknown but by on or about January 2010 continuing
6 until on or about December 6, 2016, the Defendant, in the Eastern District of
7 Washington, entered into an agreement with one or more persons to commit the
8 crime of distribution of methamphetamine and/or Cocaine and/or Heroin and/or
9 Fentanyl as charged in the Second Superseding Indictment;

10 *Second*, the Defendant became a member of the conspiracy knowing of at least
11 one of its objects and intending to help accomplish it and;

12 *Third*, the agreement to distribute involved more than 500 grams of a mixture or
13 substance containing a detectable amount of methamphetamine, 5 Kilograms or
14 More of Cocaine, 1 Kilogram or More of Heroin and 400 grams or More of
15 Fentanyl and would be reasonably foreseeable to a member of the conspiracy.

16 Conspiracy in its broadest sense is a "partnership in criminal purposes."
17 *United States v. Kissel*, 218 U.S. 601, 608 (1910); see also *United States v. Inryco*,
18 Inc., 642 F.2d 290, n.6 (9th Cir.), cert. dismissed 454 U.S. 1167 (1982); *Marino v.*
19 *United States*, 91 F.2d 691, 694 (9th Cir. 1937). Direct evidence of the agreement is
20 not required; a conspiracy may be proven by circumstantial evidence that the
21 defendants acted together with a common goal. *United States v. Iriate-Ortega*, 113
22 F.3d 1022 (9th Cir.), cert. denied, 523 U.S. 1012 (1998); *United States v. Disla*, 805
23 F.2d 1340, 1348 (9th Cir. 1986); *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir.
24 1986). The agreement may be inferred from the circumstances and the defendants'
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1 acts pursuant to the scheme. *Disla*, 805 F.2d at 1348; *Bibbero*, 749 F.2d at 587.

2 Coordination between conspirators is strong circumstantial proof of agreement; as the
3 degree of coordination between conspirators rises, the likelihood that their actions
4 were driven by an agreement increases. *Iriate-Ortega*, 113 F.3d at 1024.
5

6 The government need not prove that each conspirator participated in every overt act
7 within the conspiracy. *United States v. Burreson*, 643 F.2d 1344, 1348 (9th Cir.), cert.
8 denied, 454 U.S. 830 (1981). Further, the Government need not show that a particular
9 defendant committed an overt act within the district in which he is charged, or that the
10 defendant even entered the district, as long as one of his co-conspirators did. *United*
11 *States v. Meyers*, 847 F.2d 1408 (9th Cir. 1988).
12
13

14 Once the existence of a conspiracy is established, evidence of only a "slight
15 connection" to it by a defendant is sufficient to convict him or her with knowing
16 participation in the conspiracy. *United States v. Buena-Lopez*, 987 F.2d 657, 659 (9th
17 Cir. 1993); *Meyers*, 847 F.2d at 1413; *United States v. Taylor*, 802 F.2d 1108, 1116
18 (9th Cir.) cert. denied, 479 U.S. 1094 (1987). The term 'slight connection' means that
19 a defendant need not have known all the conspirators, participated in the conspiracy
20 from its beginning, participated in all its enterprises, or known all its details. *United*
21 *States v. Herrera-Gonzalez*, 263 F.3d 1092, 1095 (9th Cir.2001). However, the
22 connection to the conspiracy must be shown to be "knowledgeable". *Meyers*, 847
23 F.2d at 1413. This is provided for when the Government proves beyond a reasonable
24 doubt that the defendant knew of his connection to the charged conspiracy. *United*
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1 *States v. Johnson*, 297 F.3d 845, 868 (9th Cir. 2002). The Court must not just look to
2 the characteristics of individual transactions but to “the ‘entire course of dealing’ ”
3 between alleged co-conspirators. *United States v. Moe*, 781 F.3d 1120, 1125 (9th Cir.)
4 cert. denied, 136 S. Ct. 342, 193 L. Ed. 2d 246 (2015), quoting, *United States v.*
5 *Mincoff*, 574 F.3d 1186, 1194 (9th Cir.2009) (affirming conspiracy conviction where
6 seller's fronting of drugs “demonstrated mutual trust” and showed shared stake in
7 buyer's successful retail sales); See also, *United States v. Webster*, 623 F.3d 901, 907
8 (9th Cir.2010) (affirming conspiracy conviction where defendant received kickbacks
9 from buyer and fronted drugs on credit, showing shared stake in profits); *United*
10 *States v. Dinardo*, 527 F. App'x 621, 623 (9th Cir. 2013).

14 A single conspiracy can be demonstrated by evidence showing that “each
15 defendant knew, or had reason to know, ... that his benefits were probably dependent
16 upon the success of the entire operation.” *United States v. Duran*, 189 F.3d 1071,
17 1080 (9th Cir.1999). “Typically, the inference of an overall agreement is drawn from
18 proof of a single objective ... or from proof that the key participants and the method of
19 operation remained constant throughout the conspiracy.” *Id.*

22 Here, as the United States noticed in its notice of expert, there are multiple
23 roles played by multiple members of this overall conspiracy; many of them not
24 knowing necessarily all of the parts and players. Such is not required under the law.

26 The Defendants roles were identified as that of transporters, responsible for
27 backpacking quantities of various narcotics across the border. This role played out
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1 when these Defendants, along with two others, were stopped by the RCMP after
2 illegally packing across the border. As charged in the conspiracy, there were
3 substantial quantities of methamphetamine, cocaine and heroin seized along with all
4 of the physical evidence needed to support the argument as to this role. Defendant
5 Reyes' fingerprints were also located on all of the packaging. The Defendants and
6 their fellow backpackers, were picked up at the border by an individual's who had just
7 completed a money delivery in Canada at the direction of Ivan Calvillo the day before.
8 Without the Defendant and others willing to backpack these large quantities across the
9 border, the success of the entire venture would be in jeopardy. The United States
10 submits the connection to this conspiracy for both defendants has been established
11 therefore, statements made by coconspirators in furtherance of that conspiracy would
12 be admissible.
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17 3. Admission of Statement of a Coconspirator

18 A statement by a co-conspirator, during the course and in furtherance of the
19 conspiracy, is not hearsay and is admissible against other members of the conspiracy,
20 pursuant to Fed. R. Evid. 801(d)(2)(E). "[Preliminary facts relevant to co-conspirator
21 hearsay need only be shown by a preponderance of the evidence when the preliminary
22 facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by
23 a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171 (1987); see
24 also *United States v. Liera*, 585 F.3d 1237 (9th Cir. 2009). Before an alleged co-
25 conspirator's statement can be admitted into evidence under Rule 801(d)(2)(E), the
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1 government must establish that the declarant knowingly participated in a conspiracy.
2 See *United States v. Castaneda*, 16 F.3d 1504, 1507 (9th Cir.1994) (“[A]n accused's
3 knowledge of and participation in an alleged conspiracy with the putative co-
4 conspirator are preliminary facts that must be established, by a preponderance of the
5 evidence, before the co-conspirator's out of court statements can be introduced into
6 evidence.”).

7
8 The government bears the burden of proving the existence of a conspiracy
9 involving the defendant and the alleged co-conspirator at the time the statement in
10 question was made before the co-conspirator's statements can be admitted as
11 evidence. *Bourjaily*, 483 U.S. at 175. A primary issue with regard to establishing this
12 element is the amount of independent evidence the government must present to prove
13 the existence of a conspiracy. *Id.* In *Bourjaily*, the Supreme Court held that the
14 declarant's statement in question may itself be considered in deciding the threshold
15 question of whether a conspiracy existed. *Id.* at 178. This decision eliminated the
16 prior requirement that the Government provide sufficient independent evidence of a
17 conspiracy. *Id.*

18
19 This holding in *Bourjaily* was codified in the 1997 amendment to Rule
20 801(d)(2)(E) when it was stated expressly that the court shall consider the contents of
21 a co-conspirator's statement in determining “the existence of the conspiracy and the
22 participation therein of the declarant and the party against whom the statement is
23 offered.” Fed. R. Evid. 801(d)(2) advisory committee's note. The 1997 amendment
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1 however, also settled an issue that was undecided by the Court in *Bourjaily* in that it
2 provides that the co-conspirator's statement by itself does not suffice to establish the
3 existence of a conspiracy; the court must also consider the circumstances surrounding
4 the statement, such as the identity of the speaker, the context in which the statement
5 was made, or independent evidence corroborating or contradicting the statement. *Id.*
6 This addition to the Rule is consistent with the holding of every courts of appeals that
7 has considered this issue. See, *United States v. Silverman*, 861 F.2d 571, 577 (9th
8 Cir. 1988). See, e.g., *United States v. Tamez*, 941 F.2d 770, 775 (9th Cir. 1991)
9 (citing *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988)); *United States*
10 *v. Bowman*, 215 F.3d 951, 960–61 (9th Cir.2000).

11 Thus, when the proponent of a co-conspirator's statement offers no additional
12 proof of defendant's knowledge of and participation in the conspiracy, the statement
13 must be excluded from evidence. Where, on the other hand, some additional proof is
14 offered, the court must determine whether such proof, viewed in the light of the co-
15 conspirator's statement itself, demonstrates by a preponderance of the evidence that
16 defendant knew of and participated in the conspiracy.” *United States v. Diaz*, 2014
17 WL 1668600, at *8 (9th Cir. 2014), citing *Silverman*, 861 F.2d at 578.

18 Lastly, in order for the statement to be admissible the government must also
19 establish that the statement was made in furtherance of the conspiracy. *United States*
20 *v. Yarbrough*, 852 F.2d 1522, 1535 (9th Cir. 1988). The Ninth Circuit has strictly
21 construed the “in furtherance of the conspiracy requirement.” See *United States v.*
22 UNITED STATES’ CONSOLIDATED RESPONSE TO DEFENDANTS’
23 MOTIONS IN LIMINE - 19

1 *Foster*, 711 F.2d 871 (9th Cir.1983), *cert. denied*, 465 U.S. 1103, 104 S.Ct. 1602, 80
2 L.Ed.2d 132 (1984); *United States v. Fielding*, 645 F.2d 719, 726 (9th Cir.1981)
3 (holding that the “in furtherance requirement” has remained viable).

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5 Mere conversations between co-conspirators, or merely narrative declarations
6 among them, are not made “in furtherance” of a conspiracy. *United States v. Layton*,
7 720 F.2d 548, 556–57 (9th Cir.1983), *cert. denied*, 465 U.S. 1069, 104 S.Ct. 1423, 79
8 L.Ed.2d 748 (1984) (narrations of past events inadmissible while expressions of future
9 intent are admissible); *United States v. Eubanks*, 591 F.2d 513, 521 (9th Cir.1979). To
10 be “in furtherance,” the statements must further the common objectives of the
11 conspiracy or set in motion transactions that are an integral part of the conspiracy.
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13 *Yarbrough*, 852 F.2d at 1535; *Layton*, 720 F.2d at 556. Statements made to induce
14 enlistment or further participation in the group's activities are also considered to be “in
15 furtherance” of the conspiracy. *United States v. Dorn*, 561 F.2d 1252, 1256–57 (7th
16 Cir.1977) (per curiam), overruled on other grounds, *United States v. Read*, 658 F.2d
17 1225, 1236 n. 6 (7th Cir.1981). Likewise, statements made to prompt further action on
18 the part of conspirators are admissible under 801(d)(2)(E), *United States v. Kendall*,
19 665 F.2d 126, 133 (7th Cir.1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1719, 72
20 L.Ed.2d 140 (1982), as are those made to “reassure” members of a conspiracy's
21 continued existence. *United States v. Mason*, 658 F.2d 1263, 1270 (9th Cir.1981).
22 Statements made to allay a coconspirator's fears are likewise admissible. *Eubanks*, 591
23 F.2d at 521 n. 7. Most importantly, statements made to keep coconspirators abreast of
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28 UNITED STATES’ CONSOLIDATED RESPONSE TO DEFENDANTS’
MOTIONS IN LIMINE - 20

1 an ongoing conspiracy's activities satisfy the “in furtherance” of requirement. *United*
2 *States v. Eaglin*, 571 F.2d 1069, 1083 (9th Cir.1977), *cert. denied*, 435 U.S. 906, 98
3 S.Ct. 1453, 55 L.Ed.2d 497 (1978); *Moody*, 778 F.2d at 1382 (statements made to
4 “higher ups” of the group are “in furtherance”).
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6 When inquiring whether a statement was made “in furtherance of” a
7 conspiracy, the court does do not focus on its actual effect in advancing the goals of
8 the conspiracy, but on the declarant's intent in making the statement. *United States v.*
9 *Zavala–Serra*, 853 F.2d 1512, 1516 (9th Cir.1988); See, *United States v. Nazemian*,
10 948 F.2d 522, 529 (9th Cir. 1991); See also *United States v. Williams*, 989 F.2d 1061
11 (9th Cir. 1993) (holding that co-conspirator’s statement meant to keep another co-
12 conspirator abreast of conspiracy’s activities was in furtherance of conspiracy, while
13 co-conspirator’s statement of anger toward defendant was not in furtherance of
14 conspiracy); See also, *United States v. Anderson*, 813 F.2d 1450 (9th Cir. 1987);
15 *United States v. Crespo de Llano*, 838 F.2d 1006 (9th Cir. 1988).
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19 In sum, really all that is required of the Government in order to prove this
20 element is a showing that the statement in some way helped the conspirators achieve
21 their intended objectives. *Id.* See also *United States v. Smith*, 893 F.2d 1573 (9th Cir.
22 1990) (holding that a calendar/drug ledger was admissible as co-conspirator’s
23 statement where prosecution established that ledger furthered the conspiracy to
24 distribute cocaine).
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1 Here the Defendants have failed to articulate what statements should be
2 excluded. There are a number of witnesses who will identify the Defendants as a
3 playing a role in this organization in part based upon conversations directly with the
4 Defendants or with other identified conspirators to include Calvillo that were made
5 during and furtherance of the conspiracy. The United States would submit that the
6 motion at this time is too broad and likely premature. The United States is aware of
7 its foundational requirements to admits such statements.
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10 **D. MOTION FOR A BILL OF PARTICULARS**

11 Defendant REYES-GARCIA has moved the Court for a bill of particulars.
12 ECF. 620. As the Defendant notes, Rule 7(f) provides that a Defendant can move for
13 a Bill of Particulars “before or within 14 days after arraignment or at a later time if the
14 court permits.” Fed. R. Crim. P. 7(f). The Defendant now, after this case has been
15 pending for approximately 2 years, seeks relief from the Court for a bill of particulars
16 contending that he is unable to prepare his defense because he is unable to ascertain
17 the nature of the case against him. ECF. 620. Such a statement is concerning given
18 the amount of discovery and the amount of time counsel has had to review it. Rather,
19 this appears to be more of an attempt to identify sources of information and
20 cooperating defendant’s identities prior to the Court’s Ordered disclosure.
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25 Federal Rule of Criminal Procedure 7(c)(1) directs that an indictment must “be
26 a plain, concise, and definite written statement of the essential facts constituting the
27 offense charged.” It must contain the elements of the offense, and include a statement
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1 of facts and circumstances “ ‘that will inform the accused of the elements of the
2 specific offense.’” *United States v. Martin*, 783 F.2d 1449, 1452 (9th Cir. 1986),
3 abrogated on other grounds by *Schmuck v. United States*, 489 U.S. 705 (1989)
4 (quoting *United States v. Christopher*, 700 F.2d 1253, 1257 (9th Cir. 1982)). An
5 indictment should be read in its entirety, be construed according to common sense,
6 and be interpreted to include facts which are necessarily implied. *United States v.*
7 *Sialofi*, 2014 WL 12689872, at *2 (D.Alaska, 2014).
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10 As the noted in *Sialofi*, “When evaluating a bill of particulars request, the court
11 must consider whether the indictment, together with the other disclosures made by the
12 government, adequately advise the defendant of the charges against him. *Id.* Citing,
13 *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983) The rule is not intended to
14 serve as a vehicle to obtain discovery from the government. A request for a bill of
15 particulars cannot be used to “force [the] Government to spread its entire case before
16 [the] accused.” *Id.*
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19 A bill of particulars should not be expanded into a device to circumvent the
20 restrictions on pre-trial discovery contained in FED. R. CRIM. P. 16. *Cooper v.*
21 *United States*, 282 F.2d 527, 532 (9th Cir. 1960) (“it is not the function of bill of
22 particulars to force [the] Government to spread its entire case before the accused. . .
23 .”). “A defendant ‘is not entitled to know all the evidence the government intends to
24 produce but only the theory of the government’s case.’” *United States v. Gutierrez*,
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1 1991 U.S. App. LEXIS 4735, at *2 (9th Cir. 1991) (quoting *United States v. Ryland*,
2 806 F.2d 941, 942 (9th Cir. 1986)).

3 A “request for the when, where, and how of every act in furtherance of [a]
4 conspiracy, [is] equivalent to a request for complete discovery of the government’s
5 evidence, which is not a purpose of the bill of particulars.” *United States v. Giese*,
6 597 F.2d 1170, 1181 (9th Cir. 1979) (denying bill of particulars requesting how each
7 of the overt acts contributed to the charged scheme, how certain alleged co-
8 conspirator’s statements were made in furtherance of the scheme, and a list of acts
9 performed by each participant in furtherance of the conspiracy).

10 The only legitimate purpose served by a bill of particulars is to give
11 defendants sufficient information about the nature of the pending charges so that they
12 may: (1) prepare for trial; (2) avoid prejudicial surprise at trial; and (3) plead acquittal
13 or conviction as a bar to another prosecution for the same offense. *Giese*, 597 F.2d at
14 1180. “These purposes are served if the indictment itself provides sufficient details of
15 the charges and if the Government provides full discovery to the defense.” *United*
16 *States v. Mitchell*, 744 F.2d 701, 705 (9th Cir. 1984); see also *Giese*, 597 F.2d at 1180;
17 *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983); *United States v.*
18 *Federbush*, 625 F.2d 246, 252 (9th Cir. 1980). See *United States v. Robertson*, 15
19 F.3d 862, 873–74 (9th Cir.1994) (a court may properly deny a motion for a Bill of
20 Particulars in a drug conspiracy case where there is no risk of prejudice or surprise to
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1 defendants), rev'd on other grounds, 514 U.S. 669, 115 S.Ct. 1732, 131 L.Ed.2d 714
2 (1995) (per curiam).

3 The United States has provided extensive discovery in this matter, discovery
4 which has been handled through a discovery coordinator on behalf of the Defendant.
5 *See*, Attachment A. In addition to the extensive discovery, the United States has
6 provided to counsel a summary of the grand jury testimony, a proposed plea
7 agreement which contains summarized facts pertaining to the Defendant's
8 involvement and has met with counsel several times to discuss the nature of the
9 evidence against Defendant Reyes Garcia. This information has also included
10 discussion as to the proposed expert testimony pertaining to the Defendants
11 fingerprints on the above referenced backpacked narcotics.
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14 The United States submits this request for Bill of particulars, which is clearly
15 an attempt to glean the specifics of the Government's case in chief be denied.
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1 **E. TESTIFYING WITNESSES EXCLUDED FROM THE COURTROOM**

2 Defendant BRAVO-ZAMBRANO requests that all witnesses be excluded
3 from the courtroom in advance of their testimony pursuant to Fed. R. Evid. 615. ECF.
4 623 a p. 8. The United States has no objection to this request.
5

6 DATED this 20th day of February 2018.

7
8 Joseph H. Harrington
9 United States Attorney

10 *s/ Stephanie Van Marter*
11 Stephanie Van Marter
12 Assistant United States Attorney

13 *s/ Caitlin Baunsgard*
14 Caitlin Baunsgard
15 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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